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No. 83-551

In the Supreme Court of the United States

OCTOBER TERM, 1983

HANSON BRATTON, GALE BOGENN, WILLIAM SHELL, PATRICK JORDAN, CHARLES MAHONEY, individually and on behalf of all others similarly situated; and THE DETROIT POLICE LIEUTENANTS & SERGEANTS ASSOCIATION,
Petitioners,

vs.

CITY OF DETROIT, a Michigan Municipal Corporation; COLEMAN A. YOUNG, Mayor; WILLIAM L. HART, Chief of Police; DETROIT BOARD OF POLICE COMMISSIONERS; and GUARDIANS OF MICHIGAN, DAVID L. SIMMONS, ARNOLD D. PAYNE, JAMES E. CRAWFORD, CLINTON DONALDSON, WILLIE JOHNSON, KENNETH M. JOHNSON, ALFRED BROOKS,
Respondents.

Brief of State Labor Council and Michigan State Lodge — Fraternal Order of Police as Amici Curiae in Support of Granting the Writ

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QUESTION PRESENTED

I. WHETHER A MUNICIPAL GOVERNMENT AS A PUBLIC EMPLOYER, ACTING WITHOUT THE BENEFIT OF LEGISLATIVELY-DEFINED CRITERIA, IS COMPETENT TO MAKE "FINDINGS" OF PAST DISCRIMINATION AND ENACT UNILATERAL "REMEDIES" IRRESPECTIVE OF STATE LAW COLLECTIVE BARGAINING REQUIREMENTS.

TABLE OF CONTENTS

	PAGE
QUESTION PRESENTED	i
INDEX OF AUTHORITIES	iii
STATEMENT OF INTEREST	1
REASONS FOR GRANTING THE WRIT	2
I. UNLIKE THE ACT OF CONGRESS INVOLVED IN *FULLILOVE*, THE DETROIT BOARD OF POLICE COMMISSIONERS IS A PUBLIC ENTITY INCOMPETENT TO MAKE VALID FINDINGS OF PAST DISCRIMINATION AND IS PROHIBITED UNDER MICHIGAN LAW FROM UNILATERALLY IMPLEMENTING PURPORTED REMEDIES FOR PAST DISCRIMINATION	5
II. THERE EXISTS A STRONG NEED FOR THIS COURT TO SET FORTH APPROPRIATE STANDARDS AND GUIDELINES OUTLINING THE PERMISSIBLE USE OF AFFIRMATIVE ACTION IN PUBLIC EMPLOYMENT	9
CONCLUSION	10
APPENDIX	1a
I. MICHIGAN PUBLIC EMPLOYMENT RELATIONS ACT	1a
II. MICHIGAN POLICE AND FIRE COMPULSORY ARBITRATION ACT	13a

INDEX OF AUTHORITIES

CASES PAGE

American Tobacco Company v Patterson, 456 US 63 (1982) 7, 8

California Brewers Association v Bryant, 444 US 498 (1980) 7

Central Michigan University Faculty Association v Central Michigan University, 404 Mich 268, 273 NW 2d 21 (1978) 5

Detroit Police Officers Association v City of Detroit, 61 Mich App 487, 233 NW 2d 49 (1975) 5, 6

Ford Motor Company v Huffman, 345 US 330 (1953) 5

Fullilove v Klutznick, 448 US 448 (1980) 5, 6

Local 1383, International Association of Firefighters, AFL-CIO v City of Warren, 411 Mich 642, 311 NW 2d 702 (1981) 5, 6

Transworld Airlines, Inc v. Hardison, 432 US 63 (1977) 7

United Steelworkers of America v Weber, 443 US 193 (1979) 7, 9

University of California Regents v Bakke, 438 US 265 (1978) 6

FEDERAL STATUTES AND REGULATIONS

29 USC §158(d) 5

29 C.F.R. §1608.3(c)(4) 7

STATE LAW PROVISIONS

MICH. CONST. art. 4, §48 ..... 5, 8

Michigan Employment Relations Act (PERA):
MCLA §423.201, *et seq.*; MSA §17.455(1),
et seq. 3, 4, 5, 9

Michigan Police and Fire Compulsory
Arbitration Statute (ACT 312):
MCLA §423.231, *et seq.*;
MSA §17.455(31), *et seq.* 2, 3, 8

Detroit City Charter, §7-1114 2

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Respondents.

BRIEF AMICI CURIAE — STATE LABOR COUNCIL AND MICHIGAN STATE LODGE — FRATERNAL ORDER OF POLICE

STATEMENT OF INTEREST

Amicus Fraternal Order of Police, Michigan State Lodge, is a voluntary association which was organized pursuant to the laws of Michigan, chartered in 1939, and presently consists of approximately 10,700 members most of whom are involved in law enforcement occupations. The Michigan Lodge has

representation in every field of law enforcement activity and its members are employed at every level of state, county and local law enforcement.

Amicus Fraternal Order of Police, State Labor Council, is the recognized collective bargaining agent for approximately 3,500 law enforcement officers, representing approximately two hundred fifty collective bargaining units throughout Michigan. Most of the members of the Labor Council perform police functions and/or are police officers and, as such, are subject to 1969 PA 312 — Compulsory Arbitration of Labor Disputes in Municipal Police and Fire Departments. The State Labor Council has represented several hundred employees in numerous Act 312 proceedings and continues to do so at the present time. Many public employees — police officers — are working at this time under collective bargaining agreements achieved as a result of Act 312 arbitration.

The parties have given their consent to the filing of this amici curiae brief; the letters of consent are on file.

REASONS FOR GRANTING THE WRIT

PROLOGUE

Petitioners, in the District Court, asserted that the City acted improperly in unilaterally implementing racial quotas for promotion in derogation of both the substantive provisions of the applicable collective bargaining agreement[1] and the Michigan statutory prohibition against unilateral changes in

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[1] Petitioners argued that the City had violated the substantive agreement in that §7-1114 of the Detroit City Charter, requiring merit examinations for promotions, was specifically incorporated into the agreement.

promotional standards and criteria being terms and conditions of employment as defined in the Michigan Public Employment Relations Act (PERA)[2].

In its memorandum opinion, the District Court deemed these pendent state claims irrelevant since they were strictly a subject of state law and thus, subject to proceedings in state court. Appendix to Petition (hereinafter App.) at 194a, n.102. Paradoxically then, the District Court incorporated the promotional quota into a judicial decree that specifically "supercedes any provision governing promotions from the rank of sergeant to lieutenant whether incorporated in an agreement between the parties or otherwise." (App. at 261a). Thus, while the Court purported to ignore Petitioners' pendent state law claims, it simultaneously decided the issue, thereby effectively foreclosing the enforcement of Petitioners' state law rights to engage in collective bargaining.

Although the Court of Appeals affirmed the District Court's final order insofar as it operated to retain jurisdiction over the operation of, and changes in, the affirmative action plan, it rejected the District Court's decision to protect the plan by incorporating it into the final judgment. (App. 79a). Thus, although without expressly stating so, the Court of Appeals ostensibly restored Petitioners' state law collective bargaining rights when it vacated the District Court's final judicial order. (App. 78a).

Nonetheless, the Court of Appeals affirmed in all other respects the statements of law decided below, including the holding that municipal employers possess a broad "area of discretion" to design and implement "voluntary" affirmative action programs. (App. 192a). The decisions below, therefore, embrace the proposition that a municipal government is

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[2] Mich. Comp. Laws Ann. (MCLA) §432.201, *et seq.*; Mich. Stat. Ann. (MSA) §17.555(1), *et seq.*

competent to make valid findings of past discrimination as well as to unilaterally implement racial preferences as a remedy for past discrimination irrespective of the collective bargaining process. The Amici submit that this disturbing precedent wrongly confers an "area of discretion" upon municipal governments which is specifically denied by the carefully structured provisions of PERA designed to guard against the arbitrary actions of public employers by prohibiting unilateral changes in terms and conditions of employment.

As such, the decisions below cast into doubt the parameters of collective bargaining in the Michigan public employment sector. Indeed, the Court of Appeals' decision may be read to carve out an affirmative action exception to PERA, thus threatening public employees' state law collective bargaining rights.

Given the existing confusion among the circuits in this area,[3] and the corresponding lack of definitive guidelines from this Court, the Amici submit that this Court should grant the Writ herein and define the parameters of discretion to be accorded municipalities in enacting affirmative action programs as a purported remedy for past discrimination.

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[3] *See* Petition for Writ of Certiorari, pp. 11-13.

I.

UNLIKE THE ACT OF CONGRESS INVOLVED IN *FULLILOVE*, THE DETROIT BOARD OF POLICE COMMISSIONERS IS A PUBLIC ENTITY INCOMPETENT TO MAKE VALID FINDINGS OF PAST DISCRIMINATION AND IS PROHIBITED UNDER MICHIGAN LAW FROM UNILATERALLY IMPLEMENTING PURPORTED REMEDIES FOR PAST DISCRIMINATION.

Municipal employers in Michigan are specifically prohibited from, and rendered incompetent, to create and implement unilateral decisions regarding "terms and conditions of employment" as that term is defined under PERA.[4]

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[4] The Michigan Constitution of 1963 explicitly authorizes the legislature to enact laws governing public employment. ("The legislature may enact laws providing for the resolution of disputes concerning public employees . . ." MICH. CONST., art. 4, §48.) Pursuant to that authority, the legislature enacted PERA to provide public employees the absolute right to form and join labor organizations, and to collectively bargain in good faith with public employers regarding "wages, hours and other terms and conditions of employment". MCLA 423.215; MSA 17.455(15). The Michigan Supreme Court has repeatedly recognized that §15 of PERA was modeled after §8(d) of the National Labor Relations Act, 29 USC 158(d), and that the language of the two sections is virtually identical. Accordingly, Michigan cases have customarily followed the federal interpretations of parallel Michigan provisions. *See, e.g., Central Michigan University Faculty Association v Central Michigan University*, 404 Mich 268, 273 NW 2d 21 (1978); *Detroit Police Officers Association v City of Detroit*, 61 Mich App 487, 233 NW 2d 49 (1975). In federal labor relations law, seniority, promotion, and promotional criteria are included within the phrase "other terms and conditions of employment". *See Ford Motor Company v Huffman*, 345 US 330 (1953). Seniority, promotions and promotional criteria, being included within the statutory phrase "other terms and conditions" are thus, mandatory subjects of bargaining. *Local 1383, International Association of Fire Fighters, AFL-CIO v City of Warren*, 411 Mich 642; 311 NW 2d 702 (1981). Consequently, a refusal to bargain over affirmative action promotions constitutes an unfair labor practice under §10(e) of PERA. MCLA 423.210(e); MSA 17.455(10)(e).

In fact, the Michigan Supreme Court has consistently held that PERA's express prohibition against unilateral public employer actions must prevail over conflicting legislation, charters, and ordinances in the face of contentions by cities, counties, public universities and school districts that other laws or the Constitution carve out exceptions to PERA. *Local 1383, International Association of Firefighters, AFL-CIO v City of Warren*, 411 Mich 642, 655; 311 NW 2d 702 (1981).

The Michigan courts have squarely held that all promotional standards and criteria constitute a "term and condition of employment" as defined in PERA, with its mandatory duty to bargain and its attendant prohibition against unilateral employer actions. *Detroit Police Officers Association v City of Detroit*, 61 Mich App 487, 233 NW 2d 489 (1975); *accord*, *Local 1383*, *supra*. Therefore, contrary to the decisions below in the instant case, the City of Detroit and the Board of Police Commissioners have no "area of discretion" to unilaterally implement purported remedies for past discrimination by altering promotional standards and criteria to include the use of race.

As Justice Powell cogently observed in *University of California Regents v Bakke*, 438 US 265, 309 (1978), "isolated segments of our vast governmental structures are not competent to make those decisions, at least in the absence of legislative mandates and legislatively determined criteria." *See also Fullilove v Klutznick*, 448 US 448, 472-80 (1980).

The City of Detroit and its Board of Police Commissioners has no such mandate or criteria and, as evidenced by the facts of the instant case, is totally unsuited, in the absence of such

criteria, to make the "findings" it did and purport to remedy past discrimination based on those "findings".[5]

Similarly, the decisions below contrast sharply with the Equal Employment Opportunity Commission (EEOC) affirmative action guidelines which recognize that modification of promotion procedures is a matter properly entrusted to the collective bargaining process. 29 CFR §1608.3(c)(4). This Court has recognized that "[t]he collective bargaining process 'lies at the core of our national labor policy . . .'" *American Tobacco Company v Patterson*, 456 US 63, 76 (1982), *citing Transworld Airlines, Inc v Hardison*, 432 US 63, 79 (1977); *Accord, United Steelworkers of America v Weber*, 443 US 193 (1979).[6]

Thus, while the decisions below purport to apply the teachings of *Weber*, *supra*, the courts below glossed over the role of the collective bargaining agreement which constituted the voluntary affirmative action plan upheld in *Weber*, 443 US at 197. If anything, *Weber* stands for the proposition that employers and unions may (at least in the private sector) join

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[5] Aside from general population charts and graphs presented by the Chief of Police, the Board held a single public hearing at which a number of individuals related instances of discrimination involving the Detroit Police Department. Although the Detroit City Charter vested the Board with the power to subpoena witnesses, administer oaths and require production of evidence, the Board did not exercise any of these powers (J.A. 587-88), and made no attempt to verify the various incidents of past discrimination described by members of the audience. (J.A. 1131-33).

[6] To that end, this Court has frequently reaffirmed its adherence to the policy favoring minimum governmental intervention in collective bargaining. *California Brewers Association v Bryant*, 444 US 598, 608 (1980). The decisions below can only serve to denegrate this sound policy.

together in formulating appropriate affirmative action policies which advance and protect the interests of *all* employees.[7]

If allowed to stand, the decision below sets a disturbing precedent for the proposition that municipal governments are competent to make valid findings of discrimination and may unilaterally implement "remedies" based on those "findings" in the absence of legislative standards, and in derogation of the collective bargaining process. The decisions below, therefore, threaten the collective bargaining process in the public sector and contravene the strong national policy favoring a minimum of governmental intrusion in collective bargaining, espoused in *American Tobacco, supra.*

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[7] In 1968, the Michigan legislature, in an era of public employee strikes, determined that it would be appropriate to withhold from police officers and firefighters the opportunity to strike with a compulsory arbitration statute. Accordingly, the Michigan legislature enacted Act 312, MCLA 423.231, *et seq.*; MSA 17.455(31), *et seq.* Act 312 seeks to accomplish its purpose — "an alternative, expeditious, effective and binding procedure for the resolution of [interest] disputes" — through the creation of a final and binding compulsory arbitration scheme derived from the broad constitutional grant of authority in MICH. CONST. art. 4, §48. Binding arbitration under Act 312 is composed of a number of discrete, legislatively described phases and procedural safeguards. (e.g., such matters as evidentiary guidelines, subpoena powers, a requirement of written findings of fact, and a mandatory written opinion and order.) MCLA §423.236-.238; MSA §17.455(36)-.455(38).

II.

THERE EXISTS A STRONG NEED FOR THIS COURT TO SET FORTH APPROPRIATE STANDARDS AND GUIDELINES OUTLINING THE PERMISSIBLE USE OF AFFIRMATIVE ACTION IN PUBLIC EMPLOYMENT.

Amicus, Fraternal Order of Police, State Labor Council, is the exclusive bargaining agent for approximately three thousand, five hundred (3,500) law enforcement officers throughout the state, representing approximately two hundred fifty (250) collective bargaining units. The administration of these labor contracts includes all matters concerning "wages, hours and other terms and conditions of employment". PERA, *supra*. Included within this area of responsibility is the often delicate problem of affirmative action as it impacts upon terms and conditions of employment.[8]

Amicus is increasingly confronted with the question of affirmative action as it relates to the administration and negotiation of collective bargaining agreements. While this Court in *Weber, supra,* recognized that affirmative action is a proper subject of collective bargaining (at least in the private sector), this question must of necessity be dealt with in a vacuum absent definitive guidelines and criteria from this Court.

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[8] Under both PERA and Act 312, the Michigan legislature has determined the collective bargaining system to be most appropriate for public employers and their employees to negotiate regarding terms and conditions of employment. Moreover, the give and take of the collective bargaining process is capable of producing a creative alternative to any quota that would satisfy the constitutional demands to remedy past discrimination. Thus, in stark contrast to the necessarily unregulated, informal determination capable of being made by the municipal government as employer, through its Board of Police Commissioners, Act 312, through its express and detailed standards, is considerably more conducive to accurate and qualified determinations.

Amici submit that the instant case provides the factual background and offers the Court the basis and opportunity for a proper and decisive decision in this area. A definitive decision from this Court will not only limit the power of municipal government to discriminate on the basis of race, but may also provide appropriate guidelines for the incorporation of appropriate affirmative action programs into collective bargaining agreements. The absence of such guidelines commend themselves to granting the Writ in this case.

CONCLUSION

The decisions below erroneously confer an "area of discretion" on municipal employers to unilaterally implement racial quotas for police promotions without any of the requisite safeguards against arbitrary action. As a public employer, a municipal government which acts without the benefit of legislatively defined criteria is, and shall be, considered incompetent to make valid findings of discrimination, and to unilaterally implement purported "remedies" for such discrimination in the form of racial quotas. Yet, in the absence of definitive guidance from this Court, the decisions below stand as the state of the law in this area and threaten the creative input of the collective bargaining process as it impacts on permissible affirmative action. These reasons, among others, commend granting the Writ.

Respectfully submitted,

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PUBLIC EMPLOYMENT RELATIONS ACT

AN ACT to prohibit strikes by certain public employees; to provide review from disciplinary action with respect thereto; to provide for the mediation of grievances and the holding of elections; to declare and protect the rights and privileges of public employees; and to prescribe means of enforcement and penalties for the violation of the provisions of this act.

The People of the State of Michigan enact:

423.201 Definitions; rights of public employees.

Sec. 1. As used in this act:

(a) "Strike" means the concerted failure to report for duty, the wilful absence from one's position, the stoppage of work, or the abstinence in whole or in part from the full, faithful, and proper performance of the duties of employment, for the purpose of inducing, influencing, or coercing a change in the conditions, or compensation, or the rights, privileges, or obligations of employment. This act shall not be construed to limit, impair, or affect the right of a public employee to the expression or communication of a view, grievance, complaint, or opinion on any matter related to the conditions or compensation of public employment or their betterment, so long as the same is not designed to and does not interfere with the full, faithful, and proper performance of the duties of employment.

(b) "Commission" means the employment relations commission as created in section 3 of Act No. 176 of the Public Acts of 1939, as amended, being section 423.3 of the Michigan Compiled Laws.

423.202 Public employee; definition; strike prohibited.

Sec. 2. No person holding a position by appointment or employment in the government of the state of Michigan, or in the government of any 1 or more of the political subdivisions

thereof, or in the public school service, or in any public or special district, or in the service of any authority, commission, or board, or in any other branch of the public service, hereinafter called a "public employee," shall strike.

423.203 Public employees; persons in authority approving or consenting to strike prohibited; participating in submittal of grievance.

Sec. 3. No person exercising any authority, supervision or direction over any public employee shall have the power to authorize, approve or consent to a strike by public employees, and such person shall not authorize, approve or consent to such strike, nor shall any such person discharge or cause any public employee to be discharged or separated from his or her employment because of participation in the submission of a grievance in accordance with the provisions of section 7.

423.204a Application of act to state civil service employees.

Sec. 4a. The provisions of this act as to state employees within the jurisdiction of the civil service commission shall be deemed to apply in so far as the power exists in the legislature to control employment by the state or the emoluments thereof.

423.205 Repealed. 1965, p. 750, Act 379, Imd. Eff. July 23.

423.206 Public employee; conduct deemed strike; proceeding to determine violation of act; time; decision, review.

Sec. 6. Notwithstanding the provisions of any other law, any person holding such a position who, by concerted action with others, and without the lawful approval of his superior, wilfully absents himself from his position, or abstains in whole or in part from the full, faithful and proper performance of his duties for the purpose of inducing, influencing or coercing a change in the conditions or compensation, or the rights,

privileges or obligations of employment shall be deemed to be on strike but the person, upon request, shall be entitled to a determination as to whether he did violate the provisions of this act. The request shall be filed in writing, with the officer or body having power to remove or discipline such employee, within 10 days after regular compensation of such employee has ceased or other discipline has been imposed. In the event of such request the officer or body shall within 10 days commence a proceeding for the determination of whether the provisions of this act have been violated by the public employee, in accordance with the law and regulations appropriate to a proceeding to remove the public employee. The proceedings shall be undertaken without unnecessary delay. The decision of the proceeding shall be made within 10 days. If the employee involved is held to have violated this law and his employment terminated or other discipline imposed, he shall have the right of review to the circuit court having jurisdiction of the parties, within 30 days from such decision, for determination whether such decision is supported by competent, material and substantial evidence on the whole record.

423.207 Request for mediation of grievances; powers of commission; notice of status of negotiations; appointment of mediator.

Sec. 7. (1) Upon the request of the collective bargaining representative defined in section 11 or, if a representative has not been designated or selected, upon the request of a majority of any given group of public employees evidenced by a petition signed by the majority and delivered to the commission, or upon request of any public employer of the employees, the commission forthwith shall mediate the grievances set forth in the petition or notice, and for the purposes of mediating the grievances, the commission shall exercise the powers and authority conferred upon the commission by sections 10 and 11

of Act No. 176 of the Public Acts of 1939, as amended, being sections 423.10 and 423.11 of the Michigan Compiled Laws.

(2) At least 60 days before the expiration date of a collective bargaining agreement, the parties shall notify the commission of the status of negotiations. If the dispute remains unresolved 30 days after the notification on the status of negotiations and a request for mediation is not received, the commission shall appoint a mediator.

423.209 Public employees forming or joining labor organizations; collective bargaining.

Sec. 9. It shall be lawful for public employees to organize together or to form, join or assist in labor organizations, to engage in lawful concerted activities for the purpose of collective negotiation or bargaining or other mutual aid and protection, or to negotiate or bargain collectively with their public employers through representatives of their own free choice.

423.210 Prohibited conduct; service fee.

Sec. 10. (1) It shall be unlawful for a public employer or an officer or agent of a public employer (a) to interfere with, restrain or coerce public employees in the exercise of their rights guaranteed in section 9; (b) to initiate, create, dominate, contribute to, or interfere with the formation or administration of any labor organization: Provided, That a public employer shall not be prohibited from permitting employees to confer with it during working hours without loss of time or pay; (c) to discriminate in regard to hire, terms or other conditions of employment in order to encourage or discourage membership in a labor organization: Provided further, That nothing in this act or in any law of this state shall preclude a public employer from making an agreement with an exclusive bargaining representative as defined in section 11 to require as a condition of employment that all employees in the bargaining

unit pay to the exclusive bargaining representative a service fee equivalent to the amount of dues uniformly required of members of the exclusive bargaining representative; (d) to discriminate against a public employee because he has given testimony or instituted proceedings under this act; or (e) to refuse to bargain collectively with the representatives of its public employees, subject to the provisions of section 11.

(2) It is the purpose of this amendatory act to reaffirm the continuing public policy of this state that the stability and effectiveness of labor relations in the public sector require, if such requirement is negotiated with the public employer, that all employees in the bargaining unit shall share fairly in the financial support of their exclusive bargaining representative by paying to the exclusive bargaining representative a service fee which may be equivalent to the amount of dues uniformly required of members of the exclusive bargaining representative.

(3) It shall be unlawful for a labor organization or its agents (a) to restrain or coerce: (i) public employees in the exercise of the rights guaranteed in section 9: Provided, That this subdivision shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; or (ii) a public employer in the selection of its representatives for the purposes of collective bargaining or the adjustment of grievances; (b) to cause or attempt to cause a public employer to discriminate against a public employee in violation of subdivision (c) of subsection (1); or (c) to refuse to bargain collectively with a public employer, provided it is the representative of the public employer's employees subject to section 11.

423.211 Public employees; designation of bargaining representatives; grievances of individual employees.

Sec. 11. Representatives designated or selected for purposes of collective bargaining by the majority of the public

employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the public employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment or other conditions of employment, and shall be so recognized by the public employer: Provided, That any individual employee at any time may present grievances to his employer and have the grievances adjusted, without intervention of the bargaining representative, if the adjustment is not inconsistent with the terms of a collective bargaining contract or agreement then in effect, provided that the bargaining representative has been given opportunity to be present at such adjustment.

423.212 Collective bargaining representative; petition; investigation; notice; hearing; election by secret ballot; certification of results; consent election.

Sec. 12. When a petition is filed, in accordance with rules promulgated by the commission:

(a) By a public employee or group of public employees, or an individual or labor organization acting in their behalf, alleging that 30% or more of the public employees within a unit claimed to be appropriate for such purpose wish to be represented for collective bargaining and that their public employer declines to recognize their representative as the representative defined in section 11, or assert that the individual or labor organization, which is certified or is being currently recognized by their public employer as the bargaining representative, is no longer a representative as defined in section 11; or

(b) By a public employer or his representative alleging that 1 or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in section 11; The commission shall investigate the petition and,

if it has reasonable cause to believe that a question of representation exists, shall provide an appropriate hearing after due notice. If the commission finds upon the record of the hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof. Nothing in this section shall be construed to prohibit the waiving of hearings by stipulation for the purpose of a consent election in conformity with the rules of the commission.

423.213 Decision as to appropriate collective bargaining unit; supervisor of fire fighting personnel.

Sec. 13. The commission shall decide in each case, to insure public employees the full benefit of their right to self-organization, to collective bargaining and otherwise to effectuate the policies of this act, the unit appropriate for the purposes of collective bargaining as provided in section 9e of Act No. 176 of the Public Acts of 1939, as amended, being section 423.9e of the Michigan Compiled Laws: Provided, That in any fire department, or any department in whole or part engaged in, or having the responsibility of, fire fighting, no person subordinate to a fire commission, fire commissioner, safety director, or other similar administrative agency or administrator, shall be deemed to be a supervisor.

423.214 Elections; eligibility to vote; rules; runoff election; effect of collective bargaining agreement.

Sec. 14. An election shall not be directed in any bargaining unit or any subdivision within which, in the preceding 12-month period, a valid election was held. The commission shall determine who is eligible to vote in the election and shall promulgate rules governing the election. In an election involving more than 2 choices, where none of the choices on the ballot receives a majority vote, a runoff election shall be conducted between the 2 choices receiving the 2 largest numbers of valid votes cast in the election. An election shall not be

directed in any bargaining unit or subdivision thereof where there is in force and effect a valid collective bargaining agreement which was not prematurely extended and which is of fixed duration. A collective bargaining agreement shall not bar an election upon the petition of persons not parties thereto where more than 3 years have elapsed since the agreement's execution or last timely renewal, whichever was later.

423.215 Collective bargaining; duties of employer and employees' representative; subjects and limitations.

Sec. 15. A public employer shall bargain collectively with the representatives of its employees as defined in section 11 and is authorized to make and enter into collective bargaining agreements with such representatives. For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract, ordinance or resolution incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession.

423.216 Violations of §423.210 as unfair labor practices; remedies; procedures.

Sec. 16. Violations of the provisions of section 10 shall be deemed to be unfair labor practices remediable by the commission in the following manner:

(a) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the commission, or any agent designated by the commission for such purposes, may issue and cause to be served upon the person a

complaint stating the charges in that respect, and containing a notice of hearing before the commission or a commissioner thereof, or before a designated agent, at a place therein fixed, not less than 5 days after the serving of the complaint. No complaint shall issue based upon any unfair labor practice occurring more than 6 months prior to the filing of the charge with the commission and the service of a copy thereof upon the person against whom the charge is made, unless the person aggrieved thereby was prevented from filing the charge by reason of service in the armed forces, in which event the 6-month period shall be computed from the day of his discharge. Any complaint may be amended by the commissioner or agent conducting the hearing or the commission, at any time prior to the issuance of an order based thereon. The person upon whom the complaint is served may file an answer to the original or amended complaint and appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the commissioner or agent conducting the hearing or the commission, any other person may be allowed to intervene in the proceeding and to present testimony. Any proceeding shall be conducted pursuant to chapter 4 of Act No. 306 of the Public Acts of 1969, as amended, being sections 24.271 to 24.287 of the Michigan Compiled Laws.

(b) The testimony taken by the commissioner, agent, or the commission shall be reduced to writing and filed with the commission. Thereafter the commission upon notice may take further testimony or hear argument. If upon the preponderance of the testimony taken the commission is of the opinion that any person named in the complaint has engaged in or is engaging in the unfair labor practice, then it shall state its findings of fact and shall issue and cause to be served on the person an order requiring him to cease and desist from the unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay as

will effectuate the policies of this act. The order may further require the person to make reports from time to time showing the extent to which he has complied with the order. If upon the preponderance of the testimony taken the commission is not of the opinion that the person named in the complaint has engaged in or is engaging in the unfair labor practice, then the commission shall state its findings of fact and shall issue an order dismissing the complaint. No order of the commission shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if the individual was suspended or discharged for cause. If the evidence is presented before a commissioner of the commission, or before examiners thereof, the commissioner, or examiners shall issue and cause to be served on the parties to the proceeding a proposed report, together with a recommended order, which shall be filed with the commission, and if an exception is not filed within 20 days after service thereof upon the parties, or within such further period as the commission may authorize, the recommended order shall become the order of the commission and become effective as prescribed in the order.

(c) Until the record in a case has been filed in a court, the commission at any time, upon reasonable notice and in such manner as it deems proper, may modify or set aside, in whole or in part, any findings or order made or issued by it.

(d) The commission or any prevailing party may petition the court of appeals for the enforcement of the order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings. Upon the filing of the petition, the court shall cause notice thereof to be served upon the person, and thereupon shall have jurisdiction of the proceeding and shall summarily grant such temporary or permanent relief or restraining order as it deems just and proper, enforcing, modifying, enforcing as so modified, or setting

aside in whole or in part the order of the commission. No objection that has not been urged before the commission, its commissioner or agent, shall be considered by the court, unless the failure or neglect to urge the objection is excused because of extraordinary circumstances. The findings of the commission with respect to questions of fact if supported by competent, material, and substantial evidence on the record considered as a whole shall be conclusive. If either party applies to the court for leave to present additional evidence and shows to the satisfaction of the court that the additional evidence is material and that there were reasonable grounds for the failure to present it in the hearing before the commission, its commissioner or agent, the cou may order the additional evidence to be taken before the commission, its commissioner or agent, and to be made a part of the record. The commission may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file the modifying or new findings, which findings with respect to questions of fact if supported by competent, material, and substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the supreme court in accordance with the general court rules.

(e) Any party aggrieved by a final order of the commission granting or denying in whole or in part the relief sought may within 20 days of such order as a matter of right obtain a review of the order in the court of appeals by filing in the court a petition praying that the order of the commission be modified or set aside, with copy of the petition filed on the commission, and thereupon the aggrieved party shall file in

the court the record in the proceeding, certified by the commission. Upon the timely filing of the petition, the court shall proceed in the same manner as in the case of an application by the commission under subsection (d), and shall summarily grant to the commission or to any prevailing party such temporary relief or restraining order as it deems just and proper, enforcing, modifying, enforcing as so modified, or setting aside in whole or in part the order of the commission. The findings of the commission with respect to questions of fact if supported by competent, material, and substantial evidence on the record considered as a whole shall be conclusive. If a timely petition for review is not filed under this subdivision by an aggrieved party, it shall be conclusively presumed that the commission's order is supported by competent, material, and substantial evidence on the record considered as a whole, and the commission or any prevailing party shall be entitled, upon application therefor, to a summary order enforcing the commission's order.

(f) The commencement of proceedings under subdivisions (d) or (e) shall not, unless specifically ordered by the court, operate as a stay of the commission's order.

(g) Petitions filed under subdivisions (d) and (e) shall be heard expeditiously by the court to which presented, and for good cause shown shall take precedence over all other civil matters except earlier matters of the same character.

(h) The commission or any charging party shall have power, upon issuance of a complaint as provided in subdivision (a) charging that any person has engaged in or is engaging in an unfair labor practice, to petition any circuit court within any circuit where the unfair labor practice in question is alleged to have occurred or where such person resides or exercises or may exercise its governmental authority, for appropriate temporary relief or restraining order, in accordance

with the general court rules, and the court shall have jurisdiction to grant to the commission or any charging party such temporary relief or restraining order as it deems just and proper.

(i) For the purpose of all hearings and investigations, which in the opinion of the commission are necessary and proper for the exercise of the powers vested in it under this section, the provisions of section 11 of Act No. 176 of the Public Acts of 1939, as amended, being section 423.11 of the Michigan Compiled Laws, shall be applicable, except that subpoenas may issue as provided in section 11 without regard to whether mediation shall have been undertaken.

(j) The labor relations and mediation functions of this act shall be separately administered by the commission.

COMPULSORY ARBITRATION

AN ACT to provide for compulsory arbitration of labor disputes in municipal police and fire departments; to define such public departments; to provide for the selection of members of arbitration panels; to prescribe the procedures and authority thereof; and to provide for the enforcement and review of awards thereof.

The People of the State of Michigan enact:

423.231 Compulsory arbitration in police and fire departments; policy.

Sec. 1. It is the public policy of this state that in public police and fire departments, where the right of employees to strike is by law prohibited, it is requisite to the high morale of such employees and the efficient operation of such departments to afford an alternate, expeditious, effective and binding procedure for the resolution of disputes, and to that end the provisions of this act, providing for compulsory arbitration, shall be liberally construed.

423.232 "Public police and fire departments," "emergency medical service personnel," and "emergency telephone operator" defined; provisions inapplicable to certain persons.

Sec. 2. (1) Public police and fire departments means any department of a city, county, village, or township having employees engaged as policemen, or in fire fighting or subject to the hazards thereof, emergency medical service personnel employed by a police or fire department, or an emergency telephone operator employed by a police or fire department.

(2) Emergency medical service personnel for purposes of this act includes a person who provides assistance at dispatched or observed medical emergencies occurring outside a recognized medical facility including instances of heart attack, stroke, injury accidents, electrical accidents, drug overdoses, imminent childbirth, and other instances where there is the possibility of death or further injury; initiates stabilizing treatment or transportation of injured from the emergency site; and notifies police or interested departments of certain situations encountered including criminal matters, poisonings, and the report of contagious diseases. Emergency telephone operator for the purpose of this act includes a person employed by a police or fire department for the purpose of relaying emergency calls to police, fire, or emergency medical service personnel.

(3) This act shall not apply to persons employed by a private emergency medical service company who work under a contract with a governmental unit or personnel working in an emergency service organization whose duties are solely of an administrative or supporting nature and who are not otherwise qualified under subsection (2).

423.233 Initiation of binding arbitration proceedings; request.

Section 3. Whenever in the course of mediation of a public police or fire department employee's dispute, except a dispute concerning the interpretation or application of an existing agreement (a "grievance" dispute), the dispute has not been resolved to the agreement of both parties within 30 days of the submission of the dispute to mediation, or within such further additional periods to which the parties may agree, the employees or employer may initiate binding arbitration proceedings by prompt request therefor, in writing, to the other, with copy to the employment relations commission.

423.234 Delegates; selection; notice.

Sec. 4. Within 10 days thereafter, the employer shall choose a delegate and the employees' designated or selected exclusive collective bargaining representative, or if none, their previously designated representative in the prior mediation and fact-finding procedures, shall choose a delegate to a panel of arbitration as provided in this act. The employer and employees shall forthwith advise the other and the mediation board of their selections.

423.235 Selection and designation of impartial arbitrator or chairman of arbitration panel; Michigan employment relations commission panel of arbitrators; appointment, terms, qualifications, and removal of members.

Sec. 5. (1) Within 7 days of a request from 1 or both parties, the employment relations commission shall select from its panel of arbitrators, as provided in subsection (2), 3 persons as nominees for impartial arbitrator or chairman of the arbitration panel. Within 5 days after the selection each party may peremptorily strike the name of 1 of the nominees. Within 7 days after this 5-day period, the commission shall designate 1

of the remaining nominees as the impartial arbitrator or chairman of the arbitration panel.

(2) The employment relations commission shall establish and appoint a panel of arbitrators, who shall be known as the Michigan employment relations commission panel of arbitrators. The commission shall appoint members for indefinite terms. Members shall be impartial, competent and reputable citizens of the United States and residents of the state, and shall qualify by taking and subscribing the constitutional oath or affirmation of office. The commission may at any time appoint additional members to the panel of arbitrators, and may remove existing members without cause.

423.236 Arbitrator; duties; hearing; intervenors; evidence; record; expenses; actions and rulings.

Sec. 6. Upon the appointment of the arbitrator, he shall proceed to act as chairman of the panel of arbitration, call a hearing, to begin within 15 days and give reasonable notice of the time and place of the hearing. The chairman shall preside over the hearing and shall take testimony. Upon application and for good cause shown, and upon such terms and conditions as are just, a person, labor organization, or governmental unit having a substantial interest therein may be granted leave to intervene by the arbitration panel. Any oral or documentary evidence and other data deemed relevant by the arbitration panel may be received in evidence. The proceedings shall be informal. Technical rules of evidence shall not apply and the competency of the evidence shall not thereby be deemed impaired. A verbatim record of the proceedings shall be made and the arbitrator shall arrange for the necessary recording service. Transcripts may be ordered at the expense of the party ordering them but the transcripts shall not be necessary for a decision by the arbitration panel. The expense of the proceedings, including a fee to the chairman, established in advance by the labor mediation board

shall be borne equally by each of the parties to the dispute and the state. The delegates, if public officers or employees, shall continue on the payroll of the public employer at their usual rate of pay. The hearing conducted by the arbitration panel may be adjourned from time to time, but, unless otherwise agreed by the parties, shall be concluded within 30 days of the time of its commencement. Its majority actions and rulings shall constitute the actions and rulings of the arbitration panel.

423.237 Oaths; subpoenas; failure to obey, contempt of court.

Sec. 7. The arbitration panel may administer oaths, require the attendance of witnesses, and the production of such books, papers, contracts, agreements and documents as may be deemed by it material to a just determination of the issues in dispute, and for such purpose may issue subpoenas. If any person refuses to obey a subpoena, or refuses to be sworn or to testify, or if any witness, party or attorney is guilty of any contempt while in attendance at any hearing, the arbitration panel may, or the attorney general if requested shall, invoke the aid of any circuit court within the jurisdiction in which the hearing is being held, which court shall issue an appropriate order. Any failure to obey the order may be punished by the court as contempt.

423.237a Remanding dispute for further collective bargaining.

Sec. 7a. At any time before the rendering of an award, the chairman of the arbitration panel, if he is of the opinion that it would be useful or beneficial to do so, may remand the dispute to the parties for further collective bargaining for a period not to exceed 3 weeks. If the dispute is remanded for further collective bargaining the time provisions of this act shall be extended for a time period equal to that of the remand. The

chariman of the panel of arbitration shall notify the employment relations commission of the remand.

423.238 Identification of economic issues in dispute; submission and adoption of settlement offers; findings, opinion, and order.

Sec. 8. At or before the conclusion of the hearing held pursuant to section 6, the arbitration panel shall identify the economic issues in dispute, and direct each of the parties to submit, within such time limit as the panel shall prescribe, to the arbitration panel and to each other its last offer of settlement on each economic issue. The determination of the arbitration panel as to the issues in dispute and as to which of these issues are economic shall be conclusive. The arbitration panel, within 30 days after the conclusion of the hearing, or such further additional periods to which the parties may agree, shall make written findings of fact and promulgate a written opinion and order upon the issues presented to it and upon the record made before it, and shall mail or otherwise deliver a true copy thereof to the parties and their representatives and to the employment relations commission. As to each economic issue, the arbitration panel shall adopt the last offer of settlement which, in the opinion of the arbitration panel, more nearly complies with the applicable factors prescribed in section 9. The findings, opinions and order as to all other issues shall be based upon the applicable factors prescribed in section 9. This section as amended shall be applicable only to arbitration proceedings initiated under section 3 on or after January 1, 1973.

423.239 Findings and orders; factors considered.

Sec. 9. Where there is no agreement between the parties, or where there is an agreement but the parties have begun negotiations or discussions looking to a new agreement or

amendment of the existing agreement, and wage rates or other conditions of employment under the proposed new or amended agreement are in dispute, the arbitration panel shall base its findings, opinions and order upon the following factors, as applicable:

(a) The lawful authority of the employer.

(b) Stipulations of the parties.

(c) The interests and welfare of the public and the financial ability of the unit of government to meet those costs.

(d) Comparisons of the wages, hours and conditions of employment of the employees involved in the arbitration proceeding with the wages, hours and conditions of employment of other employees performing similar services and with other employees generally:

(i) In public employment in comparable communities.

(ii) In private employment in comparable communities.

(e) The average consumer prices for goods and services, commonly known as the cost of living.

(f) The overall compensation presently received by the employees, including direct wage compensation, vacations, holidays and other excused time, insurance and pensions, medical and hospitalization benefits, the continuity and stability of employment, and all other benefits received.

(g) Changes in any of the foregoing circumstances during the pendency of the arbitration proceedings.

(h) Such other factors, not confined to the foregoing, which are normally or traditionally taken into consideration in the determination of wages, hours and conditions of employment through voluntary collective bargaining, mediation, fact-finding, arbitration or otherwise between the parties, in the public service or in private employment.

423.240 Majority decision of arbitration panel final and binding; enforcement; effect of new municipal fiscal year; awarding increased rates or benefits retroactively; amending or modifying award of arbitration.

Sec. 10. A majority decision of the arbitration panel, if supported by competent, material, and substantial evidence on the whole record, shall be final and binding upon the parties, and may be enforced, at the instance of either party or of the arbitration panel in the circuit court for the county in which the dispute arose or in which a majority of the affected employees reside. The commencement of a new municipal fiscal year after the initiation of arbitration procedures under this act, but before the arbitration decision, or its enforcement, shall not be deemed to render a dispute moot, or to otherwise impair the jurisdiction or authority of the arbitration panel or its decision. Increases in rates of compensation or other benefits may be awarded retroactively to the commencement of any period(s) in dispute, any other statute or charter provisions to the contrary notwithstanding. At any time the parties, by stipulation, may amend or modify an award of arbitration.

423.241 Violation of lawful enforcement order; penalty.

Sec. 11. Where an employee organization recognized pursuant to Act No. 336 of the Public Acts of 1947, as amended, as the bargaining representative of employees subject to this act, willfully disobeys a lawful order of enforcement by a circuit court pursuant to section 10, or willfully encourages or offers resistance to such order, whether by a strike or otherwise, the punishment for each day that such contempt persists, may be a fine fixed in the discretion of the court in an amount not to exceed $250.00 per day. Where an employer, as that term is defined by Act No. 336 of the Public Acts of 1947, as

amended, willfully disobeys a lawful order of enforcement by the circuit court or willfully encourages or offers resistance to such order, the punishment for each day that such contempt persists may be a fine, fixed at the discretion of the court, an amount not to exceed $250.00 per day to be assessed against the employer.

423.242 Judicial review; scope; stay.

Sec. 12. Orders of the arbitration panel shall be reviewable by the circuit court for the county in which the dispute arose or in which a majority of the affected employees reside, but only for reasons that the arbitration panel was without or exceeded its jurisdiction; the order is unsupported by competent, material and substantial evidence on the whole record; or the order was procured by fraud, collusion or other similar and unlawful means. The pendency of such proceeding for review shall not automatically stay the order of the arbitration panel.

423.243 Existing conditions; continuance, change.

Sec. 13. During the pendency of proceedings before the arbitration panel, existing wages, hours and other conditions of employment shall not be changed by action of either party without the consent of the other but a party may so consent without prejudice to his rights or position under this act.

423.244 Act supplementary.

Sec. 14. This act shall be deemed as supplementary to Act No. 336 of the Public Acts of 1947, as amended, being sections 423.201 to 423.216 of the Compiled Laws of 1948, and does not amend or repeal any of its provisions; but any provisions thereof requiring fact-finding procedures shall be inapplicable to disputes subject to arbitration under this act.

423.246 Violations of act; imprisonment prohibited.

Sec. 16. No person shall be sentenced to a term of imprisonment for any violation of the provisions of this act or an order of the arbitration panel.

423.247 Effective date.

Sec. 17. This act shall become effective on October 1, 1969.